

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Joint Application of)
SBC Communications Inc., SBC Delaware)
Inc., Ameritech Corporation, and Ameri-) Case No. 98-1082-TP-AMT
tech Ohio for Consent and Approval of a)
Change of Control.)

ENTRY ON REHEARING

The Commission finds:

- (1) On July 24, 1998, SBC Communications Inc., SBC Delaware Inc., Ameritech Corporation, and Ameritech Ohio (hereinafter collectively referred to as the joint applicants) filed an application seeking approval of a change in ownership of Ameritech Corporation, the parent company of Ameritech Ohio.
- (2) On April 8, 1999, the Commission issued a lengthy opinion and order approving the proposed merger, under the terms of the stipulation as approved and clarified in the decision.
- (3) Section 4903.10, Revised Code, states that any party to a Commission proceeding may apply for rehearing with respect to any matters determined by the Commission, within 30 days of the entry of the order upon the Commission's journal.
- (4) On May 7 and 10, AT&T Communications of Ohio Inc. (AT&T), Sprint Communications Company L.P. and United Telephone Company of Ohio (jointly referred to as the Sprint companies), MCI Telecommunications Corporation and MCImetro Access Transmission Services Inc. (jointly referred to as the MCI companies), State Alarm Inc. (State Alarm) and Iwaynet Communications Inc. (Iwaynet) timely filed applications for rehearing. AT&T and the Sprint companies jointly alleged five assignments of error. The MCI companies allege two assignments of error. State Alarm and Iwaynet allege the same five assignments of error. Some of the allegations of error are similar and will be addressed jointly.

- (5) On May 17, 1999, the joint applicants and the Ohio Consumers' Counsel (OCC) filed memoranda contra the applications for rehearing.
- (6) AT&T and the Sprint companies (in their first three assignments of error) and the MCI companies (in their second assignment of error) argue that the Commission erred in approving the stipulation's promotional discounts for loops and collocation. Similarly, in the final assignment of error, State Alarm and Iwaynet argue that the Commission erred in not concluding that the stipulation violates an important regulatory principle when discriminatory discounts are included. Consistent with each of these entities' earlier arguments, they argue again that the stipulation's loop discounts are unlawful because they are only available for the residential market and for new entrant carriers (NECs) that enter with their own switching, while the collocation promotion is unlawful because it will result in different carriers paying different rates depending upon their customer mix.

AT&T, the Sprint companies, and the MCI companies argue that all pricing for interconnection and network elements, even if promotional pricing, must be cost-based to conform with the nondiscrimination provisions of the Telecommunications Act of 1996 (1996 Act). The joint applicants have again argued in response that, since negotiated agreements are not subject to the nondiscrimination standards set forth in Sections 251(b) and (c) of the 1996 Act, these promotions are also not subject to those nondiscrimination standards. Furthermore, the joint applicants contend that the legality of the promotions is premature because the Commission's decision did not approve any interconnection agreement with such discounts. Additionally, the joint applicants state that loop discounts for switch-based NECs will not make the preferred method of entry of some NECs (the unbundled network element {UNE} platform) a less viable entry mechanism. We found that Ameritech Ohio already has cost-based, nondiscriminatory interconnection and UNE rates and wholesale rates required by the 1996 Act. Moreover, we concluded that the stipulation and our approval would not eliminate those established rates. Thus, we were not convinced that the 1996 Act's nondiscrimination provisions were applicable to the interconnection (collocation)

and UNE promotions of the stipulation.¹ Additionally, we found the promotions to be consistent with the policies of the 1996 Act and Ohio's telecommunications policy. We found the stipulation's promotions to be acceptable. Nothing in the applications for rehearing convinces us that our conclusion was wrong. We decline to reopen this point, as suggested by State Alarm and Iwaynet.

AT&T and the Sprint companies also contend that we erred in finding that the promotional discounts will promote competition in Ohio. In this sense, AT&T and the Sprint companies believe that we improperly weighed the evidence before us inasmuch as we did not accept the testimony of AT&T's witness on this point. AT&T and the Sprint companies believe that the stipulation is unlikely to promote any significant competition in the Ohio local exchange market and, if any does develop, it will be distorted toward high-end residential customers to the detriment of small business customers. The joint applicants have noted that the stipulation's promotions collectively cover all modes of entry, making the opportunity for lower entrance barriers available to all interested NECs and encouraging residential competition. OCC states that it is appropriate for the stipulation to recognize the greater need to entice competitors to enter the residential market. We concluded that the promotions could result in significant savings. We also concluded that the terms/conditions of the promotions were reasonable attempts to "jumpstart" residential competition in Ohio by lowering some hurdles currently experienced by NECs. We were not convinced that, because the promotions were oriented toward the residential portion of the local exchange market, they should be rejected. We considered all of the evidence on these points and reached a different conclusion than that desired by AT&T, the Sprint companies, the MCI companies, State Alarm, and Iwaynet. Nothing in the applications for rehearing convinces us that our conclusions were wrong. Therefore, we deny the first

¹ AT&T and the Sprint companies state that our decision did not address their arguments regarding the unlawfulness and unreasonableness of the collocation discounts. They have misread our decision. We addressed all arguments raised about the three types of promotions, including the collocation promotion. We first disagreed that the promotions (all of them) must be cost-based in order to be lawful under the 1996 Act. Then, we disagreed that they improperly vary by type of end user customer or vary depending upon time. Lastly, we disagreed that the promotions (all of them) will not affect competition in Ohio.

three assignments of error of AT&T and the Sprint companies, the MCI companies' second assignment of error, and the fifth assignment of error of State Alarm and Iwaynet.

- (7) The MCI companies in their first assignment of error and State Alarm and Iwaynet in their first assignment of error argue that the Commission erred in approving the merger (under the terms of the stipulation) because it will not promote the public interest, convenience, and necessity. The MCI companies cite to several provisions of the stipulation to support their contention that the stipulation is inferior. State Alarm and Iwaynet reargue their earlier positions that the stipulation will not alleviate the dangers of market power abuses, service quality diminution, and discrimination created by the merger. It is correct that the stipulation does not address every concern raised in this matter, as all parties would have liked. We concluded that the proposed merger, under the terms of the stipulation as approved and clarified in our decision, was acceptable and met the statutory requirements. Again, we considered all of the evidence and reached a different conclusion than that desired by the MCI companies, State Alarm, and Iwaynet.

The MCI companies further allege that the Commission approved the stipulation and merger solely upon the basis of Rule 4901-1-30, Ohio Administrative Code. The joint applicants and OCC point out that MCI's statement is incorrect. We evaluated the proposed merger and stipulation in light of state law, federal law, and prior Commission precedent. Our decision and conclusions of law demonstrate that our decision was not based solely upon Rule 4901-1-30, Ohio Administrative Code.

- (8) In AT&T's and the Sprint companies' fourth assignment of error, they contend that the quality of service provisions of the stipulation will not promote adequate service, but instead permit a violation of the Commission's rules. In their view, the Commission will condone noncompliance with existing, service quality principles because the stipulation's penalty in this area is not triggered unless the joint applicants are approximately 10 percent out of compliance.

AT&T and the Sprint companies are also critical because the stipulation has no requirement or incentive to exceed service quality standards and does not require payment of recourse credits. Finally, on this point, AT&T and the Sprint companies contend that the record does not support the Commission's conclusion that the penalty amount is a sufficient incentive. All of these arguments were raised before. As the joint applicants and OCC note, we addressed each of these arguments before. We reached the opposite conclusion than AT&T and the Sprint companies sought. We affirm our ruling regarding the quality of service provisions of the stipulation.

- (9) In AT&T's and the Sprint companies' final assignment of error, they contend that the operations support systems (OSS) provisions of the stipulation are inadequate, unreasonable, and unlawful.² Specifically, they point to the fact that the OSS provisions do not include remedies for missed OSS standards/benchmarks. AT&T and the Sprint companies also state that the stipulation does not obligate the joint applicants to implement the Texas remedies or any remedies. That is only partly correct. The stipulation states that any remedies agreed upon in Texas will be implemented in Ohio, if the collaborative participants agree (Stipulation at 13). Also, the collaborative will consider proposed remedies, regardless of what is developed in Texas. As pointed out by the joint applicants, remedies will be implemented and it is simply a matter of when that will occur. The collaborative process will be used to implement OSS standards/benchmarks, as well as remedies for missing those standards/benchmarks. Moreover, as we noted in our decision (at page 12), parties may seek Commission redress, notwithstanding the collaborative process set forth in the stipulation.

Next, AT&T and the Sprint companies argue that NECs should have the ability to veto OSS changes, particularly given the evidence in the record regarding problems that occurred after Pacific Bell merged with SBC. We concluded

² The MCI companies make a similar argument in their first assignment of error, which we have already addressed.

that the stipulation's lack of remedies or "veto power" with OSS changes did not render the stipulation inadequate, unreasonable, or unlawful. As OCC has pointed out, an evaluation of the OSS provisions in the stipulation is appropriate in comparison with the current state of OSS in Ameritech's territory. The OSS provisions will advance the efficacy of Ameritech's OSS and will promote the public convenience. We continue to agree with our decision on this point as well. AT&T's and the Sprint companies' final assignment of error is denied.

- (10) In their second assignment of error, State Alarm and Iwaynet argue that the Commission erred in approving the merger and stipulation when settlements were not considered and parties were excluded from some settlement talks. State Alarm and Iwaynet allege that the package of settlements were not considered since one settlement agreement between Time Warner and Ameritech Ohio was not admitted into the record and other agreements were not specifically addressed in our decision. Also, State Alarm and Iwaynet argue that the settlement talks were not open to all parties because parties were excluded from negotiations relating to four other settlement documents.

The joint applicants contend that the four settlements are extraneous and have nothing to do with whether the proposed merger satisfies Section 4905.402, Revised Code. Also, they disagree with State Alarm's suggestion that the parties in this proceeding were entitled to participate in negotiations of those agreements.

This is not a case where parties were excluded from negotiations. The record indicates (and both signatory and nonsignatory parties have stated) that all negotiation sessions for resolving this case were open to all parties in this case. It is clear that, while the various parties were together, attempts were made to resolve this case and other cases. Not all of the cases involved all of the parties in this matter. Upon rehearing, we believe that the ruling precluding admission of one Time Warner/Ameritech Ohio settlement was improper. That agreement was proffered into the record and

has now been filed under seal with the Commission. We admit that exhibit (on a confidential basis) and weigh it (along with the other evidence in the record) in our reconsideration of our prior ruling. Since we have modified that ruling, we grant in part the second assignment of error of State Alarm and Iwaynet.

- (11) In the third assignment of error of State Alarm and Iwaynet, they contend that the Commission erred in failing to review and analyze, as part of the settlement package, four agreements. As noted above, three of the four settlement documents were admitted into the record. In reaching our decision in this matter, the entire record was considered. Moreover, although we do not necessarily agree that it is part of the settlement package, to avoid any doubt we have reversed and admitted into the record the one Time Warner/Ameritech Ohio settlement. We have weighed that piece of evidence (along with the other evidence in the record) in our reconsideration of our prior decision. Upon reconsideration, we find that our overall conclusions should be affirmed. For that reason, we deny the third assignment of error of State Alarm and Iwaynet.
- (12) In State Alarm's and Iwaynet's fourth assignment of error, they argue that the Commission acted unlawfully by failing to provide for discovery between the filing of the stipulation and the second phase of the hearing. The joint applicants state that all parties had the opportunity for ample discovery and discovery as to settlement discussions and negotiations is not admissible. For those reasons, the joint applicants believe that additional discovery would not have lead to the discovery of admissible evidence and the assignment of error lacks merit. OCC states that, after the stipulation was reached, no further discovery is relevant because the stipulation speaks for itself.

We considered this argument previously. We affirmed our examiners' ruling and concluded that all parties were given a fair opportunity to present evidence in this case. We continue to agree with our initial conclusion on this point. We deny this assignment of error.

It is, therefore,

ORDERED, That the applications for rehearing filed by AT&T, the Sprint companies, the MCI companies, State Alarm, and Iwaynet are denied, except to the limited extent noted in Finding 10. It is, further,

ORDERED, That this case is closed of record. It is, further,

ORDERED, That a copy of this Entry on Rehearing be served upon all parties of record and any interested persons of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Alan R. Schriber, Chairman

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